2019 IL App (1st) 180958-U

THIRD DIVISION
June 28, 2019

No. 1-18-0958

IN THE

APPELLATE COURT OF ILLINOIS

FIRST DISTRICT

LAWRENCE FOSTER and KATHLEEN FOSTER, Plaintiffs-Appellants, v. MARK DAILY, M.D.; THE WHEATON EYE CLINIC, LTD., an Illinois corporation; and CDH-DELNOR HEALTH SYSTEM, d/b/a CENTRAL DUPAGE HOSPITAL, an Illinois corporation, Defendants-Appellees.	)	Appeal from the Circuit Court of Cook County. No. 16 L 8938 The Honorable Thomas V. Lyons, II, Judge Presiding.

PRESIDING JUSTICE FITZGERALD SMITH delivered the judgment of the court.
Justices Howse and Cobbs concurred in the judgment.

ORDER

HELD: Trial court did not abuse its discretion in refusing to tender missing witness instruction IPI 5.01 to jury with respect to particular witness who did not testify at trial where plaintiffs, who had requested such instruction, failed to prove the requirements necessary for its tender.

¶ 1 Plaintiffs-appellants Lawrence Foster and Kathleen Foster (collectively, plaintiffs or as named) brought a negligence suit against defendants-appellees Mark Daily, M.D. (Dr. Daily); the Wheaton Eye Clinic, Ltd., an Illinois corporation (Wheaton Eye Clinic); and CDH-Delnor Health System, d/b/a Central DuPage Hospital, an Illinois corporation (CDH) (collectively, defendants or as named) following Lawrence's eye surgery. A jury returned a general verdict in favor of all defendants. Plaintiffs appeal, contending that the trial court erred in refusing to tender a jury instruction they had submitted during trial. They ask that we reverse the verdict below and remand the cause for a new trial. For the record, Dr. Daily and Wheaton Eye Clinic submitted a joint appellees' brief in this matter, and CDH filed a separate appellee's brief. For the following reasons, we affirm.

¶ 2 BACKGROUND

¶ 3 We cannot begin a recitation of what occurred in this cause without noting the extremely deficient statement of facts provided by plaintiffs in their appellate brief to this Court. In a medical malpractice case that saw several weeks of trial time, the testimony of some 15 witnesses (including more than a handful of medical experts), and an appellate record of over 8,000 pages, plaintiffs have provided us with a statement of facts that literally spans only 2 type-written pages. This is incredible. To say that plaintiffs have even attempted to provide us with enough context of what occurred in this matter to consider the issue they raise on appeal would be, at best, an understatement and, at worst, a lie. This was their burden, and they failed miserably. We will discuss this, and its ramifications, in more detail below. But for now, we simply wish to point out that the following facts are taken from *our* review of the record in this cause.

¶ 4 Lawrence suffered from an optical condition known as retinal wrinkling in his right eye. Essentially, this occurs when the vitreous gel in the eye thickens and contracts (often due to aging), tugging on the retina and causing a gray spot in the middle of the eye which significantly diminishes one's field of vision. Due to this condition and following his diagnosis, Lawrence was legally blind in his right eye. His ophthalmologist referred him to Dr. Daily at Wheaton Eye Clinic, an ophthalmologic retinal surgeon experienced in resolving this condition.

¶ 5 Dr. Daily examined Lawrence and recommended a vitrectomy, a surgery where the vitreous gel of the eye is removed, the retina is smoothed out, and the gel is replaced. Dr. Daily explained the benefits and risk of the surgery, which included a 70% chance for improved vision in the eye but (as with any surgery) the risk of infection. Dr. Daily had performed some 5,000 vitrectomies in his career. Lawrence elected to undergo the procedure with Dr. Daily at CDH.

¶ 6 Dr. Daily performed the surgery at CDH on January 21, 2011. The surgery consisted of Dr. Daily using surgical instruments to make three small, suture-less holes in Lawrence's eye to drain the vitreous and reach his retina. Because these holes remain open after surgery to heal on their own in two to four weeks, there is a risk of endophthalmitis, or bacteria entering the eye. Accordingly, at the conclusion of the surgery, Dr. Daily injected antibiotics into Lawrence's eye to combat this. Following surgery, Dr. Daily averred that it went as expected without any complications.

¶ 7 Lawrence followed up post-surgery with Dr. Daily the next morning, January 22, 2011. Lawrence's eye appeared normal with no signs of infection, and his vision had already improved. After the examination, Dr. Daily placed an eye patch over Lawrence's eye,

prescribed pain medication, and told him to follow up again in a week unless any problems developed. Later that afternoon and evening, Lawrence repeatedly lifted his eye patch to check his vision. He did so at 2 p.m., 4:30 p.m. and 9:30 p.m. Each time, Lawrence noted that his vision had improved and he was only experiencing minor pain, managed by the medication provided by Dr. Daily.

¶ 8 However, late that evening at about 11:45 p.m., Lawrence's pain increased dramatically. He had severe stabbing pain in his eye and his vision became cloudy. He contacted Dr. Daily, who told him to meet him at Wheaton Eye Clinic. Dr. Daily examined Lawrence between 1 and 1:30 a.m. on January 23, 2011 and diagnosed him with endophthalmitis. Dr. Daily accompanied Lawrence immediately to the emergency room at CDH and injected more antibiotics into his eye. Despite this, the infection could not be eradicated and Lawrence lost the minimal sight he originally had in his right eye prior to the vitrectomy. Laboratory studies later performed determined that the infection in Lawrence's eye was caused by a bacteria known as clostridium perfringens (C. Perf), which is an extremely aggressive strain of bacteria found only in dirt and fecal matter.

¶ 9 Lawrence and Kathleen brought suit against Dr. Daily, Wheaton Eye Clinic and CDH. Against each of these defendants separately, Lawrence asserted negligence and Kathleen asserted loss of consortium. Additionally, Lawrence brought a count asserting *res ipsa loquitor* against all three defendants collectively.

¶ 10 One of plaintiffs' theories at trial, and what has now become the linchpin of their case on appeal, involved the sterilization of operating equipment used during Lawrence's surgery. Plaintiffs focused on Andre Hinton, a CDH technician who ran an overnight test of the autoclave used to sterilize the binocular indirect ophthalmomicroscope (BIOM), a piece of

equipment that is attached to a microscope used during a vitrectomy. CDH has two BIOMs and these are sterilized in one of three autoclaves on CDH's surgical floor. Generally, after sterilization, the BIOM is attached to a large microscope in the operating room to magnify the surgeon's vision. It is installed by a scrub nurse in the operating room and an extension and lens are attached; the surgeon then uses the BIOM, extension and lens via a foot pedal to perform the surgery. None of this equipment touches the patient's eye; the lens comes closest to the eye, but even that remains at least one inch away from the eye at all times. While the BIOM undergoes sterilization in the autoclave, the lens, extension and other surgical tools used during the vitrectomy come pre-sterilized and in containers sealed by their manufacturers. With respect to the autoclave, and again, generally, this sterilizes the BIOM by enveloping it in hot steam at, via protocol, a temperature of 270 degrees Fahrenheit for at least three minutes.

¶ 11 In an evidence deposition, Hinton, who by the time of trial had moved to Texas and was no longer employed by CDH, testified that he was responsible for running the overnight test of the autoclave the morning of Lawrence's surgery. He used three methods to ensure the autoclave was functioning properly: a chemical indicator, a biological indicator and the autoclave's data printout. The chemical indicator required Hinton to place and read a chemically treated strip in the autoclave while the steam cycle ran. The biological indicator required Hinton to place a vial containing bacteria in the autoclave during the steam cycle to decipher its presence and/or growth. And, the autoclave printout required him to read an automatically generated strip showing the time and temperature inside the autoclave during the cycle. Hinton's logs with respect to all three tests were submitted into evidence, and all of them indicated that the autoclave was working properly that morning: the chemical

indicator changed color to reflect the proper amount, temperature and duration of the steam; the biological indicator showed a negative result for any bacteria; and the automatic printout showed that the steam inside the autoclave was 270 degrees or more and that the sterilization cycle ran for almost 10 minutes.

¶ 12 However, with respect to the biological indicator, there was a discrepancy in Hinton's logs, which he discussed during his deposition. That is, by way of brief explanation, the biological indicator requires two vials of bacteria: a control vial and a vial placed in the autoclave during the sterilization cycle. The test is successful, and the autoclave is properly sterilized, if bacterial spores grow in the control vial (outside the autoclave, indicating that bacteria was indeed present) but do not grow in the autoclave (indicating that the present bacteria has been sterilized by the autoclave). One column of Hinton's logs for the day in question indicates that the control vial grew spores (*i.e.*, a positive result) as it should have, and that he visually confirmed and recorded this, verifying that the autoclave was working properly. But, in a different column of his log that did not pertain to this particular test, Hinton had circled a minus, or negative, sign, indicating that the bacteria did not grow as it should have. Hinton pointed out this distinction and testified that this additional circle around the minus sign was an inadvertent mistake on his part that, again, had nothing to do with his tests conducted on the autoclave involved here.

¶ 13 Before trial began, the parties had discussions with the trial court about the production of witnesses. In their Illinois Supreme Court Rule (Rule) 237 (eff. July 1, 2005) notice to CDH to compel the appearance of witnesses at trial, which they amended more than once, plaintiffs listed several witnesses, including Hinton.[1] After suggestions from the trial court that the

[1] Plaintiffs directed this notice only to CDH, and not Dr. Daily or Wheaton Eye Clinic.

parties work together and collegially with respect to the multitude of witnesses that were anticipated at trial, CDH agreed that it would produce Hinton, even though he was no longer in CDH's employ, to plaintiffs, along with any other witness listed, should plaintiffs want to call them during their case-in-chief. CDH asked only that plaintiffs provide it with 48-hour notice so CDH could arrange for the witnesses to be present, since some, like Hinton, now lived out of state. The parties agreed to all this before the trial court. Ultimately, however, plaintiffs did not notify CDH or defendants about any desire to call Hinton as a trial witness, nor did plaintiffs ever subpoena him. In fact, even though plaintiffs mentioned during their opening argument to the jury that it would "hear from Mr. Hinton" regarding a mistake in logging, plaintiffs never called Hinton to testify at all during trial.

¶ 14 As noted, Hinton's logs were admitted at trial as substantive evidence. Additionally, several medical experts, including infectious disease expert Dr. Fred Zar and ophthalmology expert Dr. Steven Robin, as well as many occurrence witnesses, including nurses Deana Pihl and Anne Marie Herlehy and defendant Dr. Daily, testified with respect to what occurred before, during and after Lawrence's surgery. There was much focus on sterilization, and at least five witnesses reviewed and testified directly with respect to Hinton's deposition, its content, and his logs. Briefly, the following relevant evidence was adduced.

¶ 15 While the BIOM and lens extension required sterilization in the autoclave at CDH, these, again, never came in contact with Lawrence's eye but remained at all times at least one inch from it. The tools and instruments that were inserted and did penetrate Lawrence's eye for surgical purposes came in a single-use, manufacturer-sealed, pre-sterilized plastic package. A circulating nurse and a scrub nurse prepared and were present for Lawrence's surgery. The nurses wore multiple sets of gloves and draped plastic sheets over Lawrence and the

microscope to prevent contamination. After verifying the BIOM's sterilization and noting no break in sterilizing technique, the nurses attached the BIOM to the microscope and focused it over Lawrence's eye. They then removed their most outer set of surgical gloves before touching the surgical instruments. Also, immediately before surgery, Dr. Daily scrubbed in and cleaned Lawrence's eye and the surrounding exposed area with the antiseptic Betadine, as is standard surgical practice. He then used the BIOM to guide the surgery using a foot pedal.

¶ 16 Expert testimony regarding the C. Perf bacteria demonstrated that C. Perf could have been introduced in Lawrence's eye either during or after surgery. Experts also noted that this bacteria could have originated from one of three sources: it could have existed naturally in or about Lawrence's eye and survived in the folds, creases or pores around his eye despite Dr. Daily's application of Betadine before surgery; it could have been present on non-sterile equipment; or Lawrence could have introduced it himself into the open incisions in his eye after surgery through, for example, his contaminated hand touching his eye. After reviewing what occurred, expert witnesses Drs. Zar and Robin distinctly testified that the most likely scenario in this case was that C. Perf entered Lawrence's eye when he repeatedly lifted his eye patch–particularly, when he stated he did so at 9:30 p.m. Dr. Zar testified that, due to C. Perf's aggressiveness and rapid growth, it would only take an hour or two for it to multiply to the point of causing Lawrence significant pain, like that he felt at 11:45 p.m. that evening. Dr. Zar explained that, had the C. Perf infected his eye earlier that afternoon/evening (during the first or second time he lifted the patch) or even earlier (during surgery), his vision would not have continued to improve as it did throughout the day and his pain and vision loss would have occurred much earlier than 11:45 p.m. (31 hours after surgery). Accordingly, Dr. Zar

concluded that the C. Perf most likely entered Lawrence's eye during the third time he lifted the eye patch at 9:30 p.m. on January 22, 2011. In concurring, Dr. Robin testified that Dr. Daily complied with the standard of care for performing surgery in an aseptic manner. Plaintiffs did not present any testimony to dispute Drs. Zar or Robin's findings.

¶ 17 Additional evidence and testimony revealed that endophthalmitis (general bacterial eye infection) is a well known complication for a vitrectomy and may occur despite the surgical team adhering to the standard of care. However, Dr. Daily and other of the testifying experts stated that they had never heard of the specific bacteria C. Perf infecting a patient's eye during a vitrectomy. Medical literature presented at trial indicated that there had been only two cases of a C. Perf infection after eye surgery, and both involved, unlike the instant case, corneal lenses (objects foreign to the body) that had been transplanted into the patients' eyes.

¶ 18 Moreover, several witnesses who testified with respect to Hinton's deposition and his sterilization logs confirmed his testimony that the additional circle around the minus, or negative, sign had to be an inadvertent mistake. They also confirmed that any such problem or concern with the biological indicator during the test cycle would not negate the other two indicators that showed the autoclave was working properly. That is, even if the biological indicator had been wrong and not part of an inadvertent logging mistake, the chemical indicator and the autoclave's data printout both confirmed that the autoclave was working properly. And, again, none of the instruments that penetrated Lawrence's eye were sterilized in the autoclave, as they came in pre-packaged, pre-sterilized sealed bags from their manufacturers. It was also pointed out that, with respect to the autoclave's data printout, Hinton had subjected the BIOM to 270 degrees or more of steam for some 10 minutes (7 minutes more than protocol), and then at least 20 minutes in the oxygen-rich operating room.

Experts testified that this prolonged time in the autoclave, followed by exposure to oxygen (which also kills C. Perf) would have been sufficient to kill any C. Perf bacteria that may have been present on that equipment.

¶ 19 Additionally, evidence presented at trial demonstrated that, despite the loss of the originally minimal sight Lawrence had in his right eye prior to the vitrectomy, he retained 70% to 75% of his field of vision in his left eye. After the vitrectomy, Lawrence, who was 56 at the time of the surgery, was still able to drive a car and he returned to work for some four years, until his retirement.

¶ 20 As the trial progressed, defendants moved the trial court for directed verdicts on plaintiffs' direct negligence counts against them.[2] The trial court granted directed verdicts on these claims in favor of all three defendants. Plaintiffs agreed with the decision, explaining to the court that they no longer wanted "to go to the jury on the direct negligence" counts and would have moved to voluntarily dismiss them at this point if the trial court were not going to grant defendants' motions. Plaintiffs also told the court that, "because [they themselves were] arguing we can't make causation the normal way," they were "just going to" proceed solely on the *res ipsa loquitor* count against all defendants.[3]

¶ 21 With the direct negligence counts dismissed, and with the cause proceeding to the jury on the *res ipsa loquitor* count only, the court held a jury instructions conference at the close of the evidence. Plaintiffs tendered Illinois Pattern Jury Instruction, Civil, No. 5.01 (IPI No. 5.01), directed only at CDH, concerning "missing" witnesses and claiming that CDH had not

[2] Dr. Daily and Wheaton Eye Clinic moved for directed verdict on these counts as against them at the close of plaintiffs' case-in-chief, and CDH moved separately for directed verdict on this count as against it later at the close of evidence. Incidentally, these parties also sought directed verdicts on the *res ipsa loquitor* count, but the trial court denied them, finding that there was "sufficient evidence" to send this sole count to the jury.

[3] Plaintiffs in no way challenge the grant of the directed verdicts in favor of all three defendants with respect to the direct negligence counts.

called three specific witnesses at trial, including Hinton.[4] With respect to Hinton, plaintiffs argued that, although he was a former employee of CDH, he was a current employee of its parent company within the same hospital group. They further noted that, as the author of the sterilization log for the autoclave, and as there was a discrepancy in that log, "any reasonably prudent person would have called" him to testify, and it could "be presumed from not having called him that he has something that would be bad or inconsistent or not helpful to" CDH.

¶ 22 CDH countered by reminding the trial court of what had occurred prior to trial. It noted that plaintiffs had listed Hinton in their Rule 237 notice to compel production of witnesses and that CDH, having made clear that he was no longer employed by it and now lived in Texas, nonetheless agreed to facilitate his appearance when and if plaintiffs wanted to call him during their case-in-chief. CDH further reminded the court that all it had asked from plaintiffs was a couple days' notice, as Hinton was no longer under their control, and that, although plaintiffs initially said they intended to call him and even told the jury as much during their opening statement, they decided not to do so during trial and never subpoenaed him. As this was plaintiffs' right to so choose, and because defendants did not have a burden to call any witnesses, CDH opposed an IPI 5.01 instruction to the jury. Additionally, CDH explained that it, too, chose not to call Hinton for several reasons. First, it did not "want to drag the case out." It also thought plaintiffs' case "was sufficiently weak" and that, because of this, it did not "need to rebut and address all these issues." And, it believed that there was sufficient evidence presented regarding sterilization and the logs that had been "covered by all of the other witnesses in the case," thereby making Hinton's testimony cumulative. CDH

[4] Of the three witnesses cited by plaintiffs at trial, only Hinton is the subject of their appeal.

made clear to the trial court that "the most important thing" was that Hinton was "equally available to [plaintiffs] and they chose not to" call him to testify.

¶ 23 The trial court recalled for the record the discussions the parties had before it at the start of trial. It also recalled that defendants, and particularly CDH, had indicated to plaintiffs that it would make the witnesses it sought, and specifically Hinton, available upon request. Accordingly, it denied plaintiffs' proposed instruction and refused to tender IPI 5.01 to the jury. Plaintiffs then sought clarification from the trial court, asking if this meant they were precluded from arguing to the jury that defendants did not call Hinton. The trial court made clear that plaintiffs were permitted to mention to the jury that defendants did not call Hinton, "as long as" plaintiffs did not "attempt to shift the burden of proof." It also advised the parties that any of them "can comment on what the evidence was and reasonable inferences to be drawn from the evidence." Thus, during rebuttal closing argument, plaintiffs discussed the logging discrepancy regarding the biological indicator of the autoclave and told the jury, in part:

> "And Mr. Hinton was the person that in fact put that negative there.
>
> And by the way, Mr. Hinton didn't come in that courtroom to say anything about what happened. Isn't that *** interesting? I wonder why they didn't bring him in."

¶ 24 Following closing argument and instructions, the cause was submitted to the jury. The jury returned a general verdict in favor of all defendants.

¶ 25 ANALYSIS

¶ 26 On appeal, plaintiffs' sole contention is that the trial court committed error by refusing to tender IPI 5.01 to the jury with respect to technician Hinton. They argue that Hinton was in

charge of the sterilization of the autoclave, which was discussed at trial, and they anticipated that because of this, defendants would call him as a witness. They further argue that they (plaintiffs) could not have called Hinton as a witness because he was not "available" to them, as he is a current employee of CDH and was represented by defendants' lawyers, which runs afoul of attorney-client privilege, and that regardless, Hinton would have been biased against plaintiffs. Plaintiffs insist that they were not required to call Hinton and "there is no reasonable explanation as to why" defendants did not call him in their case-in-chief "since his testimony was vital to" their defense. Thus, they contend they were entitled to an IPI 5.01 missing witness instruction due to defendants' failure to present Hinton.

¶ 27 As a threshold matter, we return to address our initial comments made at the outset of this cause. That is, and as all defendants make note, there are fundamental deficiencies in plaintiffs' appellate brief submitted before this Court. In fact, defendants ask that, due to the severity of these deficiencies, we dismiss this cause outright or summarily affirm the decision below without addressing the issue raised.

¶ 28 Undoubtedly, plaintiffs have committed various violations of our Illinois Supreme Court Rules governing the form and content of briefs on appeal. And, these violations could be considered to border on the verge of egregiousness. As defendants point out, and as we can clearly and immediately see of our own accord, the violations are obvious and do, in a very real sense, hinder a proper and thorough review of this cause. Plaintiffs provide minimal citation to the record on appeal and, most significantly, no citation to the report of proceedings in either their statement of facts or argument sections of their brief in violation of Rules 341(h)(6) and (h)(7). Ill. S.Ct. Rs. 341(h)(6), (7) (eff. May 25, 2018). Moreover, plaintiffs provide no viable table of contents to the record on review in the appendix to their

brief in violation of Rules 341(h)(9) and 342. Ill. S.Ct. R. 341(h)(9) (eff. May 25, 2018); Ill. S.Ct. R. 342 (eff. July 1, 2017).

¶ 29 In their statement of facts, plaintiffs completely fail to cite to the trial transcript. While there are a few, scant references to some record page numbers, these are only to the common law record, for example, to the assertions in their own complaint or to portions of various depositions. There is no reference to the lengthy trial record, no reference to any of the testimony presented at trial, and no reference even to the jury instruction conference. Plaintiffs are appealing a jury verdict, one based directly (and solely) on what was presented at trial; more particularly, they are appealing the trial court's decision not to give an instruction which they proposed. The failure to cite to any portion of the trial transcript or, more particularly, to the jury instruction conference which forms the entire crux of their appeal, is shocking, and only to be surpassed by plaintiffs' failure to provide any citation to the record in the argument section of their brief. Here is where plaintiffs attempt to use portions of testimony and discussions had with the trial court to support their contention on appeal, and yet, they provide no support for their assertions in the vital form of citations to the report of proceedings–nothing as to the jury instruction conference, the instruction they proposed, their reasons articulated in support of the instruction, the trial court's ruling on it, or the basis for its decision.

¶ 30 Because of this, we feel the need to outline for plaintiffs the requirements and importance of our Supreme Court rules. The mandates they prescribe "are rules and not mere suggestions." *Ryan v. Katz*, 234 Ill. App. 3d 536, 537 (1992); accord *Hall v. Naper Gold Hospitality LLC*, 2012 IL App (2d) 111151, ¶ 7. Their purpose is to require parties to present clear and orderly arguments before our Court so that we may properly ascertain and dispose

of the issues involved. See *Hall*, 2012 IL App (2d) 111151, ¶ 7. Failure to comply with these is not an inconsequential matter; a brief so lacking in conformity with these rules may be stricken, arguments may be considered forfeited, or the entire appeal may be dismissed. See *North Community Bank v. 17011 South Park Ave., LLC*, 2015 IL App (1st) 133672, ¶ 14; accord *Hall*, 2012 IL App (2d) 111151, ¶¶ 7, 8.

¶ 31 Specific to this cause, Supreme Court Rule 341(h) governs the content of an appellant's brief. In particular, Rule 341(h)(6) requires a statement of facts that contains the facts necessary to an understanding of the case. See Ill. S.Ct. R. 341(h)(6) (eff. May 25, 2018); *Hall*, 2012 IL App (2d) 111151, ¶ 9. Rule 341(h)(7) requires that an appellant's arguments contain his contentions and the reasons therefor, with citation to the pages of the record relied upon in support of them. Ill. S.Ct. R. 341(h)(7) (eff. May 25, 2018); *Hall*, 2012 IL App (2d) 111151, ¶ 12. And, Rules 341(h)(9) and 342 require that an appellant provide an appendix to his brief, which is to include a complete table of contents of the record on appeal, with page references to that record and the names of all witnesses and the pages of their examinations. Ill. S.Ct. R. 341(h)(9) (eff. May 25, 2018); Ill. S.Ct. R. 342 (eff. July 1, 2017); *North Community Bank*, 2015 IL App (1st) 133672, ¶ 13.

¶ 32 It is at this point that, in such cases where we address an appellant's failure to comply with Illinois Supreme Court Rules governing the format and content of the brief submitted on appeal, we provide the same, well-established, black letter law that is so often repeated. That is, these rules are, simply put, compulsory. See *Voris v. Voris*, 2011 IL App (1st) 103814, ¶ 8. Regardless of an appellant's status, *i.e.*, whether he is represented or appears *pro se*, no party is relieved of the duty to comply, as closely as possible, with the rules of our courts. See *In re Marriage of Petrik*, 2012 IL App (2d) 110495, ¶ 38; *Voris*, 2011 IL App (1st)

103814, ¶ 8. Ultimately, we are " ' "not a depository in which the appellant may dump the burden of argument and research" ' " for his cause on appeal. See *Marriage of Petrik*, 2012 IL App (2d) 110495, ¶ 38 (quoting *Kic v. Bianucci*, 2011 IL App (1st) 100622, ¶ 23 (quoting *Thrall Car Manufacturing Co. v. Lindquist*, 145 Ill. App. 3d 712, 719 (1986)).

¶ 33 What concerns us about the instant cause, and the reason why we have devoted so much of our decision here reflecting on these particular Supreme Court Rules, is the dearth of information plaintiffs have provided us in light of the plethora of evidence involved in this cause. They omitted the most basic of facts and they essentially fail to acknowledge the very existence of the report of proceedings. As we noted earlier, this was not the average, run-of-the-mill case. This was a medical malpractice cause against a surgeon, a clinic and a hospital. It was tried before a jury and lasted several weeks. Over 15 witnesses testified, including 8 medical experts, some of whom were occurrence witnesses and several others who were testifying experts. The appellate record spans over 8,000 pages, some 5,500 of which comprise the trial transcript. All the parties were represented by attorneys below, and are again represented on appeal by considerable law firms.

¶ 34 Yet, with all this said, plaintiffs completely left us to sift through the record not only to determine what occurred below, but also to find support for the issue they raise. This is not our responsibility. See *Express Valet, Inc. v. City of Chicago*, 373 Ill. App. 3d 838, 855 (2007). Their 2-page statement of facts with no viable citation to the trial transcript, coupled with a table of contents that in no way directs us to any witness or his testimony, is frustrating enough. But, what really made it difficult for this Court was plaintiffs' complete lack of citation to matters in the record relevant to the review of their particular claim of error, namely, the trial court's decision not to give IPI 5.01. We understand that plaintiffs

wish to only raise one issue on appeal, and that this issue is, admittedly, a narrow one. We also understand that combing through a record as massive as the instant one to find support for such a narrow issue can be, to put it mildly, tedious. Perhaps a full recitation of every testifying witness in this particular case may not have been necessary, since the issue on review concerns only a jury instruction. However, appropriately citing to the record is a necessity, and a good-faith effort to do so is required. Here, plaintiffs excluded any reference of the parties' initial discussion with the court regarding the provision of Hinton to testify in court, as well as any citation to the point at the end of trial when the jury instruction conference was had, when plaintiffs raised the issue of a missing witness instruction, when the parties argued this, and when the trial court ruled on this. Rather, what plaintiffs did provide us with, in the statement of facts and arguments sections of their brief, was in no way a good-faith attempt to support their contention, even though it is a narrow one. Rather, it barely acquainted us with the issue involved on appeal.

¶ 35 Ultimately, as defendants note, we do have the discretion to strike plaintiffs' brief and dismiss their appeal based on their failure to comply with the applicable rules of appellate procedure. See *Holzrichter v. Yorath*, 2013 IL App (1st) 110287, ¶ 80. And, honestly, with the lack of their brief's form and content, this would be easy for us to do so. However, despite these shortcomings, we choose, in our discretion, and in the interests of judicial economy, to review their appeal. See *In re Estate of Jackson*, 354 Ill. App. 3d 616, 620 (2004) (reviewing court has choice to review merits, even in light of formulaic mistakes on litigant's part).

¶ 36 Turning now to the merits of plaintiffs' appeal, their sole contention is that the trial court erred in refusing to give IPI 5.01 with respect to Hinton, who did not testify at trial. They

assert that this missing witness instruction was necessary because Hinton was not available to them as a current employee of CDH, because his testimony would have been biased against them, and because CDH provided no reasonable excuse as to why it did not call him. Based on the record before us, and particularly the trial transcript, we wholeheartedly disagree.

¶ 37 We begin with the applicable standard of review and a brief explanation of IPI 5.01.[5] IPI 5.01 is known as the missing witness instruction. It may be given when a party fails to call a particular witness at trial. The instruction allows a jury to draw an adverse inference from that party's failure, without reasonable excuse, to produce that witness when the witness is in the party's control and is not equally available to the opposing party. See *Nassar v. County of Cook*, 333 Ill. App. 3d 289, 298 (2002); *Skelton v. Chicago Transit Authority*, 214 Ill. App. 3d 544, 585 (1991). In line with the text of IPI 5.01, it should be given only when a foundation is presented to show that: (1) the witness was under the control of the party and could have been produced by reasonable diligence; (2) the witness was not equally available to the adverse party; (3) a reasonably prudent person under the same or similar circumstances would have produced the witness if he believed the witness' testimony would have been favorable to him; and (4) no reasonable excuse for the failure to produce the witness has been shown. See IPI Civil 5.01; *Nassar*, 333 Ill. App. 3d at 298; *Roeseke v. Pryor*, 152 Ill. App. 3d 771, 781 (1987); accord *Kersey v. Rush Trucking, Inc.*, 344 Ill. App. 3d 690, 696 (2003); see also *Graves v. Rosewood Care Center, Inc.*, 2012 IL App (5th) 100033, ¶ 45. The party seeking the instruction must demonstrate each of these elements before the instruction may be given to the jury by the trial court. See *Anderson v. Chesapeake and Ohio Ry. Co.*, 147

[5] Plaintiffs provided neither of these in their brief on appeal. In fact, with respect to the standard of review, plaintiffs provide only two sentences: one dealing with the review of jury verdicts and the other dealing with the review of rulings on motions for a new trial. Neither is applicable; plaintiffs appeal from, and only from, the trial court's refusal to give their proposed IPI 5.01 instruction to the jury.

Ill. App. 3d 960, 872 (1986). Moreover, IPI 5.01 is not warranted, and need not be given, if the unproduced witness' testimony would be merely cumulative of facts already established. See *Kersey*, 344 Ill. App. 3d at 696. The decision whether the tender IPI 5.01 is within the sound discretion of the trial court and that decision will not be reversed absent a clear abuse of discretion. See *Nassar*, 333 Ill. App. 3d at 298-99; *Skelton*, 214 Ill. App. 3d at 586; *Roeseke*, 152 Ill. App. 3d at 780; accord *Kersey*, 344 Ill. App. 3d at 696; see also *Graves*, 2012 IL App (5th) 100033, ¶ 45.

¶ 38 Plaintiffs fail to demonstrate the required elements meriting the provision of IPI 5.01 in the instant cause.

¶ 39 First, plaintiffs did not properly show that Hinton was under the control of CDH. Plaintiffs consistently assert in their brief on appeal that Hinton was a current employee of CDH at the time of trial. Yet, they provide no record citation for this. In reality, the record demonstrates that, at the time of trial, Hinton had already moved to Texas and was no longer working at CDH. In fact, the trial transcript reveals that plaintiffs knew that Hinton was not employed by CDH at the time they proposed IPI 5.01 to the trial court. During the parties' discussion on this jury instruction issue with the trial court, plaintiffs acknowledged that Hinton was, indeed, a "former employee of CDH." Our court have generally held that a witness who is no longer employed by a party is not considered under that party's control within the context of IPI 5.01's requirements. See *Laport v. Lake Michigan Management Co.*, 252 Ill. App. 3d 221, 227 (1991) (defendant-employer no longer had control over witness because he was not employed by defendant-employer at time of trial and, thus, trial court did not abuse discretion in refusing to give missing witness instruction); *Anderson*, 147 Ill. App. 3d at 972-73 (refusal to give IPI 5.01 was not abuse of discretion where defendant-

employer did not have control over particular witness who was former employee at time of trial).

¶ 40 In other portions of their brief, plaintiffs slightly pivot on their stance and claim that Hinton was under CDH's control because, although he lived in Texas at the time of trial, he was still a current employee of CDH's "*parent* company." Again, plaintiffs give no record citation proving this assertion, nor do they ever identify the parent company. Even were this to be true, it does not change our finding. Plaintiffs provide us with no case law to support the notion that a witness can be considered under a defendant-employer's control for the purposes of IPI 5.01 when that witness is no longer employed by the defendant-employer but, rather, by the defendant-employer's parent company–an entirely separate entity. Frankly, in light of *Laport* and *Anderson*, this surely could not be legally true. Moreover, CDH's parent company, whomever it was at the relevant time, is not a party to the instant cause. So, even if it could be said that Hinton continued to work for CDH's parent company at the time of trial while he was living in Texas (of which we have absolutely no indication), the fact would remain that he was not an employee of any party to this action. In addition to the fact that Hinton himself was never named as a defendant or codefendant of CDH, it cannot be said that he was under CDH's control within the context of IPI 5.01.

¶ 41 Next, plaintiffs failed to demonstrate to the trial court that Hinton was not equally available to them. Plaintiffs claim that, in addition to Hinton being a current employee of CDH and/or of its parent company resulting in their inability to subpoena him without violating attorney-client privilege, his testimony undoubtedly would have been biased against them since his conduct and potential liability were directly at issue. Hinton may well have been represented by CDH's counsel very early on in this cause, at the time of his deposition.

However, by the time of trial, this was of no matter. Again, Hinton was no longer an employee of CDH by the time of trial and was not a party to this cause. Moreover, and more importantly, the record indicates that, even before trial had begun, defendants agreed in court to produce Hinton to plaintiffs, should they want to call him in their case-in-chief. Again, plaintiffs filed a Rule 237 notice naming Hinton and seeking to compel his appearance. A pretrial discussion was then had between the parties and the trial court with respect to collegiality and witness production in what was expected to be a lengthy trial involving many witnesses, and CDH agreed to produce Hinton, even though he was no longer under its control. It asked only that plaintiffs provide it with 48-hour notice so CDH could arrange to have Hinton, who was in Texas, present at trial. Plaintiffs agreed.

¶ 42 Yet, it was plaintiffs who, even though they mentioned in their opening statement to the jury that Hinton would testify, chose never called him in their case-in-chief. Plaintiffs now insist they were never required to call Hinton and they anticipated defendants would call Hinton in their case-in-chief, whereupon they would have questioned him then. If this were truly their strategy all along, then it is a poor one. Plaintiffs are correct in one aspect–they were never "required" to call Hinton. But, defendants, who did not have the burden of proof in this cause, were under no obligation to call Hinton (or any witness, for that matter), either. Relying on defendants to call Hinton was a critical mistake on their part. If plaintiffs wanted him to testify, they had the chance to call him. As the record clearly shows, the offer for Hinton's production was made *by defendants* in the presence of the trial court and before trial began. Plaintiffs' failure to take advantage of this offer–at which they initially seemed to jump, since they had filed a Rule 237 notice and had even mentioned to the jury that Hinton would testify–does not change the fact that Hinton was equally available in the context of IPI

5.01. And, as far as any potential bias in Hinton's testimony, there is simply no indication of this. Hinton's logs were admitted as substantive evidence in this cause, and some five witnesses testified with respect to these and to the contents of his deposition–all essentially testifying in the same manner that his logs were correct that the sterilization process had occurred properly in the autoclave and that the extraneously circled minus sign in his log sheets was an inadvertent error. There is nothing in the record, and plaintiffs provide us with nothing, to indicate that Hinton, had he testified, would have stated something different or would have otherwise been biased against them. Ultimately, the record makes clear that Hinton was equally available as a witness and was even offered on a silver platter to plaintiffs to call in their case-in-chief. Plaintiffs riskily chose not to call him, hoping defendants would, a risk that did not work out the way they anticipated. This, however, does not satisfy the non-availability element of IPI 5.01. See *Laport*, 252 Ill. App. 3d at 227 (to merit IPI 5.01, it must be that the party seeking the instruction "did not have equal opportunity to obtain" the witness at issue; where the defendant provided the plaintiff with the most recent, last known address of the witness, witness was equally available and, thus, IPI 5.01 was not warranted).

¶ 43 Third, other than summarily stating that defendants would have brought Hinton in to testify if they really believed him, plaintiffs provide us with nothing to satisfy the requirement that the witness would have been produced if he were favorable. That is, plaintiffs make no showing that Hinton would have been unfavorable to defendants in his testimony and favorable to plaintiffs (and that is why defendants did not produce him), or favorable to defendants and unfavorable to plaintiffs. The crux here is this: it was always clear as to what Hinton would testify, and plaintiffs offer nothing to show what more, or

different, Hinton would have said had he taken the stand, how his testimony would have conflicted with the other trial testimony and evidence, or how his testimony would have otherwise been unfavorable to defendants. Again, his logs had been submitted into substantive evidence; his deposition had already been taken in full; and five other witnesses were present, testified and were cross-examined about those logs, his deposition, the autoclave data recordings, the charting, the proper function of the autoclave, etcetera. Hinton stated, and repeated, that the autoclave was working properly and that the circled negative (minus) sign was an inadvertent mistake on his part, nothing more. In light of all the other evidence presented with respect to this, that defendants did not call Hinton to testify simply bears no relation as to whether they "believed" him to be "favorable."

¶ 44 The fourth and final requirement for an IPI 5.01 instruction is that the party has offered no reasonable excuse for its failure to produce the witness. Plaintiffs insist that defendants here never offered such an excuse and could not have done so, since Hinton was "vital" to their defense. However, plaintiffs miss the mark with their argument, for several reasons. The record shows that defendants provided multiple reasons why they did not produce Hinton to testify, ones which we find reasonable, and that they did so, no less, before the trial court. Initially, as noted, when plaintiffs raised the issue of providing the jury with an IPI 5.01 instruction at the end of trial, the parties and the trial court had a lengthy discussion. In opposing the instruction, defendants reminded the trial court that before trial began, they had agreed to produce Hinton, but that it was plaintiffs who chose not to take them up on this offer, nor to even subpoena him. Additionally, defendants explained to the trial court that they did not want "to drag the case out." In reflecting about how the trial had gone, defendants made known to the court that they, in their trial strategy, believed that plaintiffs'

case was "sufficiently weak" and that they did not "need to rebut and address" all the issues they had raised, particularly the logs and whether the autoclave had functioned properly. Defendants also mentioned that they believed all the points they wanted to make had been "covered by all the other witnesses in the case" and, thus, testimony from Hinton, who lived out of state, would have been superfluous.

¶ 45 We agree with defendants here. We can easily see how defendants would reach the conclusion that Hinton's testimony was simply not necessary and, thus, determine that they did not need to fly him in from Texas to testify. Contrary to plaintiffs' claim, Hinton was not "vital" to their defense. Plaintiffs asserted many instances of negligence at trial on defendants' parts; Hinton's involvement with the autoclave was only one of these. Moreover, five witnesses had been presented and testified as to Hinton's logs and deposition. They testified in great detail about the autoclave, the sterilization process, the defendants' policies regarding sterilization, the autoclave's tests, the charting and logs and whether the autoclave was working properly. All of them agreed with Hinton's explanation that the circled minus sign on a portion of the logs that admittedly had no relevance to the particular autoclave testing on the morning of Lawrence's surgery was an inadvertent mistake. All of them also agreed that the other two autoclave tests (the chemical indicator and data printout) showed that the autoclave was functioning properly that day and that any problem with the biological test would not negate the results of the other two tests in any way. And, all of them agreed that the items that penetrated Lawrence's eye during (the surgical tools) and after (Lawrence's fingers) the surgery were not sterilized in the autoclave, which was the only apparatus with which Hinton was involved. Thus, any testimony Hinton would have provided would have been only cumulative and not necessary in light of the reasonable excuses for its

nonproduction as provided by defendants. See *Kersey*, 344 Ill. App. 3d at 696 (IPI 5.01 not warranted if the unproduced witness' testimony would be merely cumulative of facts already established).

¶ 46 Ultimately, plaintiffs are required to meet every required element of the IPI 5.01 missing witness instruction before it may be given to the jury. See *Anderson*, 147 Ill. App. 3d at 872. Plaintiffs here did not do so. Accordingly, we find that the trial court did not abuse its discretion in refusing to tender IPI 5.01 during the instant trial.[6,7] See *Nassar*, 333 Ill. App. 3d at 298-300; accord *Laport*, 252 Ill. App. 3d at 227; *Anderson*, 147 Ill. App. 3d at 972-73.

¶ 47 CONCLUSION

¶ 48 For all the foregoing reasons, we affirm the judgment of the trial court.

¶ 49 Affirmed.

[6] We acknowledge for the record that, even though the trial court did not give IPI 5.01, it nonetheless allowed plaintiffs to mention to the jury during closing argument that defendants did not call Hinton to testify and to draw inferences from this fact. Again, Plaintiffs did so during rebuttal closing argument when, while speaking about the autoclave and logging discrepancy, they stated:

"And Mr. Hinton was the person that in fact put that negative there.

And by the way, Mr. Hinton didn't come in that courtroom to say anything about what happened. Isn't that *** interesting? I wonder why they didn't bring him in."

[7] Having found no merit to plaintiffs' claim on appeal, we need not address any further, additional argument raised by defendants in support of affirmance here.